United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

366

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22366

PAUL KISH, Appellant

v

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court
for the District of Columbia

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(appointed by this
Court)
Southern Building
Washington, D.C.

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TABLE OF CASES

*Cases principally relied upon.

ISSUES PRESENTED*

I. Was it error for the court to admit as part of the Government's case the out-of-court identification of the appellant by a Government witness at the Assignment Court of the Court of General Sessions when the court made no inquiry as to:

a. whether the appellant was entitled to counsel at the pre-trial identification, and if so, whether such Sixth Amendment right had been violated, and

b. whether the totality of the circumstances of the pre-trial confrontation were such that the procedure involved was so impermissibly suggestive as to result in a denial of due process.

II. Was it error for the court to fail to sustain appellant's motion to strike the in-court identification of the Government witnesses' as a product of a pre-trial identification procedure so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification where:

a. the procedure in question involved the display of only two photographs and both were of the prime suspect of the case,

b. the witnesses knew that there was only one prime suspect of the case and that the detective showing the photographs was the officer in charge of the case, and

c. where there was no evidence of independent source upon which the in-court identification could stand.

*This case has not before been before this Court.

STATEMENT OF THE CASE

Appellant was indicted September 14, 1967, on charges of Grand Larceny and House Breaking (22D.C.C. 2201, 22 D.C.C. 1801), was convicted March 28, 1968, and was sentenced to be confined one to three years on each count, sentences to run concurrently with all but six months suspended on each count, the remainder of the portion appellant to be placed on probation. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1291.

Some time early Thursday morning, August 3, 1967, the safe at a gas station located at 4530 Wisconsin Ave, N.W. was the subject of a larceny.

The first witness for the Government, Paul Rhienhart, stated that he was overall manager of the gas station, (Tr.23) he had hired Kish, the appellant, as night manager in June of 1967. (Tr. 23), and that in the course of Kish's responsibilities as night manager, he had access to the full safe, that is the combination to the outer door of the safe and the key to the inner door of the safe, (Tr. 23) and that other people having the key to the inner door of the safe were Paul Stathis, Major Griffith and himself. (Tr. 33)

Rhienhart indicated that since he had begun working for the station in March of 1967, they had had quite a "change-over"

in personnel and that any of these people reaching the position of shift manager or assistant shift manager would have been given the combination of the safe, (Tr. 58), although he had no record of how many people had the combination of the safe (Tr. 59), nor a record as to the individuals who had keys to the front door at that time. (Tr. 60)

Beginning the last Sunday in July (July 31), the station ended its twenty-four operation and began closing at two a.m. (Tr. 44), and a time lock was installed at this time. (Tr. 45). Kish was relieved of his position as night manager due to shortages in his account, (Tr. 78) and Paul Stathis was made night manager in his place. (Tr. 78) On August 1, 1967, Rheinhart had to let Kish go. (Tr. 24) On the morning of August 3, 1967, Rheinhart went to the station after being called there by the owner and saw that the safe was empty. (Tr. 27) Later, while taking inventory at the station he noticed that two tubes were missing of the same type that Kish had wanted him to give him the preceding day. (Tr. 41)

The report from the time lock company indicated that the following operations of the door occurred on August 2 and 3: on August 2, the station was first opened at 5:48 a.m. and then closed at 2:24 on Thursday morning. The door was then opened at 2:27 that same morning and closed seventeen minutes

later at 2:44 a.m. (Tr. 32) At 2:58 this same morning the door was once more opened and closed at 3:04 a.m. The next time the door was opened was at 6:11 Thursday morning. (Tr.33)

Paul Stathis testified that he had been working at the station during that summer from 11:00 in the evening until 7:00 in the morning, and that when the station ceased twenty-four hour operation, his shift was changed to 4:00 in the afternoon until 2:00 in the morning, and he became shift manager of this shift. (Tr. 89) Stathis stated that he had taken in $257 in cash during his shift on August 2 and had placed this amount in the safe. (Tr. 94-95)

When confronted with the time recordings of the lock, Stathis could not explain them. He had no idea who opened the door at 2:27 and then locked it at 2:44, although after about 2:20 or so (Tr. 97), he came back into the front of the station to get the key to a back part of the station in order to get his laundry from the back. (Tr. 98) This may have taken "fifteen to twenty minutes" (Tr. 99), as he recalled. But he insisted that he <u>did</u> lock the door when he was away from the front of the station. (Tr. 98) He could not also account for the opening of the door at 2:58 nor its subsequent closing at 3:04. (Tr. 106)

Officer Daly and Lt. Brill were on Wisconsin Ave. heading south on a radio call. As the cruiser stopped for a traffic light near the gas station, Daly noticed a light on in the station and pulled in to investigate. (Tr. 110) As he drove

up to the window of the station, Daly observed a man come out of the restroom, which was inside the station, turn and wave to the officers (Tr. 111) and proceed to the back of the station. (Tr. 123) The police assumed that the man they saw was an employee and left. (Tr. 111) Daly indicated that the one he saw in the station was Kish. (Tr. 113) Daly further testified that he went to the Assignment Court of General Sessions and had seen Kish there. (Tr. 114) On Saturday after the crime, Daly was shown two pictures of Kish while in the presence of Lt. Brill; the pictures were exhibited by Dect. Holden. (Tr. 129-130) He did not however, testify that he recognized the pictures to be of the individual he had seen in the gas station.

Lt. Brill testified, in sum, to the same occurrences at the gas station during the early hours of Thursday, August 3. (Tr. 137) He also testified as to seeing the photos of Kish Saturday morning, the fifth of August. (Tr. 147) Likewise, he did not testify as having recognized the photos as being those of the one he had seen in the station the previous Thursday.

John Rhodes, the next witness for the Government, stated that he arrived at the station the next morning to open it up for business around 6:00 a.m. and found the safe empty but no sign that it had been broken into. (Tr.155).

Robert Mullis, the last witness for the Government, testified that he could find no identifiable fingerprints on the safe on the morning of August 3. (Tr.168)

Det. Holden, who had been in charge of investigating the case (Tr. 175) was called as defense witness and testified that the two photos he had shown to Brill and Daly were of Kish. (Tr. 185)

Kish testified that he had been employed at the station as part of a work release program in connection with a charge of driving after having his license revoked. (Tr. 20,203). He also stated that when Stathis replaced him as manager he had a disagreement with him resulting in his leaving the station's employ (Tr. 208) and that he turned over his keys to Rheinhart on the following day. (Tr. 208)

Kish indicated that he was in jail for thirty days on another charge of driving on a revoked permit for which he had been arrested on August 15, 1967. On the night of the larceny he stated he went to see a special movie he had been waiting to see at a drive in along with a girl friend. (Tr. 233) He also testified that he did not go into the station and steal the money. (Tr. 241)

I.

Appellant moved to strike the identification testimony of Officer Daly, part of which involved an out-of-court identification of appellant. In denying the motion, the court did not direct its attention to the questions whether: 1) appellant's right to counsel had been violated necessitating an exclusion of the out-of-court identification under the Gilbert case; 2) if appellant's right to counsel had not been violated, still the pre-trial identification was so unnecessarily suggestive and conducive to irreparable mistaken identification that appellant was denied due process by the admission of the out-of-court identification. The failure of the court below requires a remand of the case for a further exploration of the circumstances of the pre-trial confrontation.

As part of the Government's case, Daly testified that he had seen the man who had been in the gas station the night of the larceny at the Assignment Courtroom of General Sessions, on August 18, 1967 (Tr. 114). Appellant's motion to strike the identification testimony of this witness was denied. (Tr. 134, 172-174)

Since the events of this pre-trial confrontation occurred after the Supreme Court's decision in Wade, Gilbert and Stovall[1] these cases govern. Wade and Gilbert stand for the right of the accused to have counsel present at pre-trial confrontations; Gilbert indicated that where there was a violation of this right,

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[1] Wade v. U.S., 388 U.S. 218; Gilbert v. California, 388 U.S. 263; Stovall v. Denno, 388 U.S. 293. (June 17, 1967)

the out-of-court identification by the witness must not be allowed in evidence while Wade the case was remanded for the lower court to determine whether the in-court identification had an origin independent of the improper pre-trial confrontation and could be admitted notwithstanding the absence of counsel at the lineup. Since the trial court in denying appellant's motion to strike Daly's identification testimony did not concern itself with the confrontation at General Sessions, few of the circumstances were brought out at trial and appear in the record. This situation is analgous to those cases involving pre-trial confrontations prior to Wade, Gilbert and Stovall where this Court has remanded cases to the courts below for findings of law and facts relevant to Stovall due process issues[2]. Appellant submits a remand is necessary in this case for a determination whether the pre-trial confrontation here is one in which the appellant's Sixth Amendment rights to counsel were violated.

In not considering the circumstances of the General Sessions identification, the court below could not determine whether the circumstances surrounding the pre-trial identification by Daly were so unnecessarily suggestive and conducive to

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[2]eg. Gross v. U.S., ___U.S.APP. D.C.___, F2d___, No. 20g53, decided Feb. 19, 1969; Sera-Leyva v. U.S., ___U.S.APP. D.C. ___, ___F2d___, No. 20619, decided Feb. 18, 1969; Mendoza-Acostav v. U.S., ___ U.S. APP. D.C. ___, ___F2d___, No. 21754, decided Feb. 11, 1969.

possible mistaken identification that the admission of the out-of-court identification violated appellant's right to due process notwithstanding he might not have any right to counsel at such pre-trial confrontation. The record only discloses that Daly "was called down to the Assignment Court" (Tr. 129) and that no individuals preceded Kish out of the lock up although other individuals had been brought out of the lock up earlier. (Tr.114) Un-answered important questions are whether there were other members of Kish's race present,[3] whether what occurred amounted to a "one man show up",[4] and whether the marshall recited Kish's name when he was brought in.[5]

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[3] Sera-Leyva, distinquishing the case of Clemons v. U.S., ___U.S.APP.D.D.___, No. 21001, 21249, 19846 (Dec. 6, 1968) on the grounds that the accused, Clemons and Hines, were both Negroes and presumably entered the hearing room followed by several others of their race, a factor lowering the likelihood of misidentification.

[4] Wade v. U.S., ___ U.S.APP.D.C.___,___F2d, No.20712 (Jan. 1969) where this Court pointed out it was not a "one man show up" when accused was identified by witness as he sat behind a railing in the General Sessions courtroom with a group of three or more men.

[5] Sera-Leyva, supra. where this Court indicated it wished to know if accused's name had been mentioned in the confrontation at the Commissioner's hearing. Daly was aware that one named Kish was the prime suspect in the case. (Tr. 183)

This Court has been reluctant to make determinations of Stovall due process problems in cases with records containing far more information than exists in the record of the present case[6] and since a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it[7], each case has to be considered on its own facts.[8] As the record here is insufficient to convey the totality of circumstances occurring at the Assignment Court, appellant submits that it is necessary that the case be remanded for a fuller exploration of the facts by the trial court.

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[6] Sera-Leyva, supra; Gross v. U.S., supra

[7] Stovall, supra., at 302.

[8] Simmons v. U.S., 390 U.S. 377, at 384 (1968)

> The showing of only two photographs of the same suspect by the investigating officer to the eye witnesses was highly suggestive. The totality of the surrounding circumstances, ie., there was no urgency justifying such procedure, the officers had poor opportunity to view the subject before the display of the photos, the absence of a detailed description prior to the showing of the photographs, the officers gave the name and address of the prime suspect to the investigation officer, are such as to indicate the procedure in this instance was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. Thus, it was error for the trial court not to strike the in-court identification of the two eye witnesses.

On cross examination Daly and Brill testified that on the Saturday following the crime they were shown pictures of Kish by Det. Holden. (Tr. 129), 147) Holden testified that he showed them only two pictures and both of them were of Kish. (Tr. 185)

In Simmons[9] the Supreme Court held that it would set aside convictions based on eye witness identifications at trial following a pre-trial identification by photograph on that ground "if the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[10] Then applying the Stovall standard in that case, the Supreme Court first discussed the urgency of the situation in confronting the investigating officers and then considered

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[9] Simmons v. U.S., 390 U.S. 377 (1968)

[10] Ibid., 384.

factors felt important to a determination of the totality of the circumstances surrounding the identification procedure.

The urgency involved was that a dangerous felony had been committed and that it was important for the FBI to know if they were on the right track so as to know whether to deploy their forces in certain areas and whether to alert authorities in other cities. Such urgency is absent in the present case.

In Simmons, the Court further noted that the crime occurred in a well lighted bank, the five witnesses could see the robber identified as Simmons for periods up to five minutes, at least six photos were shown to the witnesses, the photographs were group photographs, the witnesses were alone when viewing the photographs and there was no evidence that the witnesses were told anything concerning the progress of the investigation or that the FBI agents in any other way suggested which persons were under suspicion.

In the instant case the two witnesses were not even aware at the time that they were looking in the gas station that the one they were observing was a criminal, rather they assumed he was an employee. (Tr. 111, 139) The amount of time the officers had to view the individual was slight since the man was not seen until they pulled up to the show window, and, in the words of Daly, he "had walked out of the restroom; .. he maybe got far enough by the restroom for the door to close and turned on a slight angle to us, waved and proceeded back to the back of

the station." (Tr. 123)[11] Only two photos were shown to Brill and Daly and both were of the prime suspect, Kish,[12] and the officers viewed the pictures in the presence of each other. (Tr. 124) In Simmons the court there made the point that there was no evidence that the witnesses had been aware of the progress of the investigation or that the FBI agents in any way suggested which persons were under suspicion. Here, however, Lt. Brill and Officer Daly knew Holden was the officer to whom the case was assigned for investigation (Tr. 126, 127, 128) and moreover gave Holden the name and address of whom they considered the suspect to check out, (Tr. 182, 183) and thus knew exactly who was under suspicion. When several days after they

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[11] Compare with Dade v. U.S. ___U.S. APP. D.C.___, ___F2d___, No. 20712 (Dec. 1968) where identifying witness's attention was drawn to a "strange man" who passed her on the street; subsequently she was able to view him during and after the attack, while in the instant case it was not the presence of a man but the light on in the restroom of the station which attracted the officers attention (Tr. 110) also Cunningham v. U.S., ___U.S. App. D.C.___, ___F2d___ No 21450 (Feb. 19, 1969) where victim had a good opportunity to observe accused due to the very nature of the crime; Williams v. U.S. ___U.S.App. D.C.___, ___F2d___, No. 21072 (Feb. 24, 1969) where during the course of the robbery the victim "turned around and got a good look at him (the accused)"; and Sera-Leyva, supra, where witness cab driver had a habit of turning on his dome light and staring in the fact of all his passengers before collecting the fare in consequence of his having been held up before.

[12] A similar procedure has been characterized by this Court as highly suggestive, Young v. U.S., ___ U.S. APP. D.C.___, ___F2d___, No 21504, (Jan. 24, 1969)

had given Holden the suspect to check out, it would be unreasonable for them not to expect Holden to check back with them and request some sort of identification since they were aware that they were the only witnesses who saw anything.

Assuming that the procedure here involved was so suggestive as to result in a denial of dur process, the trial court could still have admitted the in-court identification by Brill and Daly if an independent source for the identification could be found.[13] The trial court did not address itself to this point when deciding appellant's motion to strike the identification testimony and this Court has been reluctant to initiate a finding of an independent source even in a case where the identification is unusually strong and where the opportunity to view the suspect at the time of the crime is excellent.[14] Situations where this court has found independent sources of the in-court identification have rested upon a finding of a good opportunity to view the accused at the scene[15] and also upon a distinctive

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[13] Gross v. U.S., ___U.S.App.D.C.___,___F2d___,No. 20953, (Feb. 19, 1969).

[14] Gross, Ibid. relying on the fact that there was no detailed description by the identifying witness prior to the pre-trial confrontation. In the case at hand the only description given Holden by Brill and Daly was a "general One". (Tr. 192)

[15] eg., Cunningham v. U.S., ___U.S.App.D.C.___,___F2d___, No. 21450, (Feb. 19, 1969); Dade v. U.S., ___U.S.App.D.C.___, ___F2d, No. 20712 (Dec. 1969)

description of the accused prior to the challenged confrontation.[16] As pointed out above, the only description Holden received from Brill and Daly was a general one, and the opportunity to observe the man in the station was sharply limited by time and visibility.[17] Appellant submits that there is not sufficient evidence in the record to find an independent source upon which the in-court identification can rest upon, and thus, it was error for the trial court to admit the in-court identifications.

Relying upon the aforementioned errors, appellant requests that this Court reverse the decision below and remand for a new trial directing the court below not to admit the out-of-court identification of Daly nor the in-court identification of either Brill or Daly, or in the alternative to remand to the court below for a fuller exploration of the facts concerning the procedures involved in the pre-trial identifications, making findings of fact and law.

Respectfully submitted,

John J. Pyne
Counsel for Appellant

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[16] Gross, supra,; Dade, supra., where the witness noticed a distinctive scar.

[17] see note 11, supra., and Tr. 124-5, Daly's description of the sales-room.